

COMPLIANCE BOARD OPINION NO. 02-5
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June 3, 2002

*The Honorable Rachel S. Polk
Salisbury City Council*

The Open Meetings Compliance Board has considered your complaint alleging that three of your colleagues on the Salisbury City Council violated the Open Meetings Act when they wrote to Mayor Tilghman on February 11, 2002, concerning Phases II and III of the Northeast collector road project. Based on the information before us, we find that the Act was not violated in the production of the letter.

In responses filed by Councilmen Stacey, Scott, and Webster, questions were raised in connection with specific closed meetings relating to this project. For the reasons explained below, we decline to issue an opinion on those meetings. We do offer some comments, however, about Open Meetings Act requirements, based on information in the record, in order to assist the Council in its future compliance.

We also note that the correspondence on this matter contains ample evidence that aspects of the Northeast collector road project are highly controversial, and the controversy in turn has resulted in various allegations that officials have not acted as they should have. The Compliance Board has no jurisdiction over any allegation of legal or ethical impropriety other than alleged violations of the Open Meetings Act. Nothing in this opinion is to be taken as a comment or finding on any issue apart from compliance with the Act.

I

Complaint; Responses

The essence of your complaint is that Councilmen Stacey, Scott, and Wester violated the Open Meetings Act when they sent a letter to the Mayor concerning the sequence of the second and third phases of the Northeast collector road project. In their February 11, 2002, letter, a copy of which was enclosed with your complaint, the councilmen indicated that they “have reached a conclusion, as a Council majority, regarding the [project].” The letter indicated that the consensus reached

at a closed meeting on January 14th to proceed with Phase III of the project “is not the [p]resent intent.” They explained:

Upon further consideration and based upon a phone conversation Mr. Stacey had with Mr. Wilber [the City Solicitor], we now are convinced that we must move forward with BOTH Phase II and Phase III at the same time. However, the priority should go with Phase II as it is a logical sequence in the development of the collector roadway. We realize that special financing in the way of bonding may be necessary but we have to assume this responsibility so that both phases may be completed as soon as possible.

This change in position apparently resulted from additional information that Council President Stacey discovered on his own following the January 14th meeting. It also varied from a vote taken at a February 7th closed meeting, at which time the same three council members voted to proceed with Phase II. You indicated in your complaint that “[t]here was never a motion, discussion nor vote taken to proceed with both phases. This decision was made without my input and that of my fellow councilwomen. Further, there was no public notification of such a meeting and no notification by any means was received by either of us to attend such a meeting.”

The Compliance Board initially received separate responses from Paul D. Wilber, the City Solicitor, and from Councilmen Stacey, Scott and Webster. At the request of our counsel, Mr. Wilber supplemented his initial response, addressing the role of the Council in this matter and the production of the February 11, 2002, letter. We also received supplemental responses from Council members as well as a follow-up letter from the City Solicitor. Collectively, the full record, including various attachments, appear to paint a relatively thorough history of the Northeast collector road project. However, it is unnecessary for us to restate that full history for purposes of evaluating your complaint.¹

¹ Our request to the City Solicitor for additional information and requests from respondents to keep the record open for further comments account for the extended delay in the issuance of this opinion.

II

Discussion

A. Preliminary Matter

The Compliance Board is charged with issuing advisory opinions in connection with the Open Meetings Act. §10-502.5(d)(2) and (i).² The process by which we issue an opinion is set forth in the statute. Under the Act, the Compliance Board's review is premised on a complaint filed with the Board and a response filed by the public body alleged to have violated the Act. *See* §10-502.5. In this instance, as part of responses filed with the Compliance Board, three of the five Council members requested that we review specified meetings of the Council. Although the meetings were related to Northeast collector road project, they were not directly related to the specific allegation in the complaint.

Because the request for review was made outside the process contemplated under the Act, we limit our holding to the issue raised in the complaint itself. However, in order to assist the Council with its future deliberations, we shall address what appear to be certain misconceptions concerning the applicability of the Act, as well as the obligation of the Council concerning compliance with the Act's procedural requirements.

B. Regulation of "Meetings"

The determinative issue concerning your complaint is whether, applying the Open Meetings Act definition of the term "meet," the three Councilmen "met" in the production of the letter of February 11th. If they did, the Act was violated, because it is evident that no notice of the meeting was provided. *See* §10-506. Conversely, if no "meeting" took place, no violation occurred, because, as we explain, the Act only applies to "meetings."

Subject to limited exemptions set forth in §10-503,³ the Open Meetings Act governs the meetings of a public body such as the Salisbury City Council. The Act, however, does not control a public body's decision on how it is to conduct its business, and in particular whether it will discuss a matter in a meeting. "For

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

³ Under §10-503, the Open Meetings Act generally does not apply when the Council is engaged in an executive or quasi-judicial function. However, these exemptions are qualified. If the Council is granting of a license or permit or considering any zoning matter, the Open Meetings Act would apply. *See* §10-503(b).

example, the Act does not inhibit a public body from conducting business in writing, rather than at a meeting.” Compliance Board Opinion 99-12 (August 26, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 70, 71-72 (internal citations omitted).⁴ In other words, the Open Meetings Act could not have been violated unless the three Councilmen improperly conducted a “meeting,” as defined in the Act, in connection with the February 11, 2002, letter.

The Act defines “meet” as “to convene a quorum of a public body for the consideration or transaction of public business.” §10-502(g). Generally, three members of the five-member Council would constitute a quorum. §10-502(k).⁵ Thus, your complaint turns on whether the signatories to the February 11th letter conducted a “meeting” between February 7th and February 11th.

Councilmen Stacey, Scott, and Webster deny that a meeting occurred. In his letter of April 8, 2002, Mr. Wilber indicates that the letter was prepared by Councilman Stacey and Councilman Webster signed the letter at the City Clerk’s Office. Mr. Wilber indicates that the three Councilmen did not meet at the City Clerk’s Office. While it is obvious that Councilman Scott signed the letter at some point before delivery to the Mayor, there is no evidence before us that the three Councilmen ever met, or otherwise communicated collectively, as to the topic of the letter. The Open Meetings Act does not preclude members of a public body from discussing public business among themselves outside of a “meeting,” provided a quorum is not present. *See, e.g.,* Compliance Board Opinion 99-5 (June 22, 2002), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 45, 47 (Discussion among board members is not subject to Act, absent a quorum); *see also* Compliance Board Opinion 02-4 (May 21, 2002), slip op. at 2 (Even if public business considered, Act did not apply if quorum not present).

Based on the information available, it appears that no meeting occurred. Therefore, we find that the Act was not violated in the production of the letter.

⁴ Of course, other law may require that a public body take action only at a meeting of the body. For example, §SC 2-11 of the Salisbury municipal charter addresses the process by which the Council may enact an ordinance. However, that provision would not apply to the action at issue.

⁵ The statute reads:

“Quorum” means:

- (1) a majority of the members of a public body; or
- (2) any different number that law requires.

C. General Observations

In responses from a majority of the City Council, significant emphasis was placed on the effect of its decisions in connection with specific meetings they described. For example, the responses noted that the Council may determine whether there is a consensus on a specific issue, but such a determination has no binding effect. The responses also noted that certain sessions were closed at the request of the Mayor and/or City Solicitor and questioned whether discussions during these sessions were within permissible bounds of the cited exemptions. Finally, the responses noted that the minutes of certain meetings were not complete.

1. Application of Open Meetings Act

As we understand it, the Council routinely meets twice a month for work sessions to discuss matters that may appear on the agenda of future regular meetings. During these sessions, a consensus may be noted on whether to proceed with a given matter. This recognition that a Council majority favors a course of action, however, is not viewed as a legally effective decision about the matter.

For Open Meetings Act purposes, whether the consensus identification process lacks legal effect is beside the point. The Act is aimed at *any* meeting in which public business is *considered* or transacted. A public body is free to label a meeting whatever it wants, whether it be “work session” or similar designation, but the label is immaterial in determining whether the Act applies. Compliance Board Opinion 02-4 (May 21, 2002), slip op. at 2. Similarly, the informality of a public body’s actions, such as a mere “consensus” identification without any legal effect, has no bearing on whether the Open Meetings Act applies.

Consequently, if a public body meets simply to take the pulse of the body on a matter expected to come before it, or even to discuss adding the matter to a future agenda, that meeting is ordinarily subject to the Open Meetings Act. We have emphasized that it is “an impermissible circumvention of the Act for a public body to use an informal gathering as a device to script discussion at the meeting, to set the agenda for discussion, or to discuss the merits of any matter that is to be dealt with at the meeting proper.” See Compliance Board Opinion 01-2 (January 12, 2001), slip op. at 6, and authority cited therein.

In the meetings noted in the responses, the Council acted to share its views on a project with the Mayor, an expression apparently without any binding effect. It is also clear that certain aspects of the project were governed by existing law. However, based on the information before us, it appears that, at some point, the Council will need to approve a budget and possibly a bond issue before construction

of Phase III of the project. Because these actions would not be outside the scope of the Open Meetings Act, even a preliminary meeting to determine the views of the Council on the project is subject to the Open Meetings Act. While a public body may close a meeting to the public for enumerated reasons in accordance with the Act, such as consulting with counsel for legal advice or considering the acquisition of property for a public purpose, §10-508(a), any discussions during the closed session must be confined to the applicable statutory justification on which the body relied.

2. *Procedural Requirements*

The Open Meetings Act places several procedural requirements on a public body. For example, the body may close a meeting under §10-508 only by majority vote. §10-508(d). Thus, while the Mayor or counsel may recommend that a closed session be conducted, the decision to close a meeting under the Act rests with a majority of the public body. Although we encourage legal counsel to assist a public body comply with the Act, ultimate responsibility lies with the public body.

Similarly, it is the public body that is responsible for ensuring that minutes of its meetings are accurate and satisfy the requirements of §10-509. In fact, minutes are not considered minutes of the body until such time as the body has had an opportunity to review and correct the work of whoever prepared them and then formally approve the draft. *See Compliance Board Opinion 98-3 (May 12, 1998), reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board 11, 13.* This ultimate responsibility cannot be shifted elsewhere.

III

Conclusion

The Open Meetings Compliance Board finds that three City Council members, a majority of the Council, did not violate the Open Meetings Act when they sent the letter of February 11, 2002, to the Mayor expressing their views as to completion of the Northeast collector road project. Their action involved no “meeting” to which the Act applied.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb